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NOTICE

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Decisions of the United States Court of International Trade

(Slip Op. 90–115)

EMILIO A. DI IORIO, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–05–00233

[Plaintiff's motion for judgment on the administrative record is denied. Defendant's cross-motion for judgment on the administrative record is granted. Case dismissed.]

(Decided November 1, 1990)

Emilio A. Di Iorio, pro se.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, (*Nancy M. Frieden*), Civil Division, United States Department of Justice, for the defendant.

OPINION

RESTANI, *Judge*: Pursuant to Rule 56.1(d) of the Rules of the United States Court of International Trade, plaintiff requests a Judgment Upon the Administrative Record regarding the denial of his application for a Customs broker's license.

Plaintiff seeks reversal of the U.S. Customs Service's denial of his Customs broker's license. The denial was based on plaintiff's failure to achieve a passing score of 75 on the Customs broker's examination. *See* 19 C.F.R. § 111.13(e) (1989). For the following reasons plaintiff's motion is denied and the case is dismissed.

BACKGROUND

Plaintiff sat for the Customs broker examination on October 2, 1989. In a letter dated October 23, 1989, the U.S. Customs Service ("Customs") advised plaintiff that he received a score of 71 on the examination, whereas a grade of 75 or better was required to pass. On November 10, 1989, plaintiff wrote a letter to the Broker Compliance and Evaluation Branch of Customs requesting a review of his examination and protesting sixteen of the test questions. In a letter dated December 26, 1989, Customs informed plaintiff that he would be given credit for two additional points, but that the new score of 73 was still two points short of a passing grade.

Plaintiff then sought to have the matter reviewed by the Secretary for Enforcement, U.S. Department of Treasury. The Assistant Secretary for

Enforcement (the "Assistant Secretary") rejected plaintiff's appeal of the grading of eight exam questions in a letter dated March 1, 1990. In a second letter to the Assistant Secretary, dated April 4, 1990, plaintiff pursued his request for review of the grading of six questions on the Customs exam. The Assistant Secretary denied plaintiff's appeal of the grading of those six questions in a letter dated April 26, 1990.

This action was commenced when plaintiff sent a letter dated April 27, 1990, to this Court requesting review of the administrative agency's denial of his application to be licensed as a Customs broker. Plaintiff requests reversal of the Assistant Secretary's decision based on his arguments concerning five questions on the exam.[1]

DISCUSSION

Standard of Review

In accordance with the scope and standard of review set forth in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the final administrative decision of the Assistant Secretary in this case will be upheld, unless his decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988).[2]

Given that the Assistant Secretary's decision rested on his analysis of a standard examination, this court notes that, as a general matter, it will not substitute its own judgment on the merits of the Customs examination, but will examine decisions made in connection therewith on a reasonableness standard. Judicial intrusion into agency decisionmaking regarding the formulation and grading of standardized examination questions should be limited in scope. Accordingly, this court will grant some deference to the administrative determination as it relates to the appropriateness of various questions and the answers selected on the Customs broker's licensing examination.

Technically this court is reviewing the Assistant Secretary's decision itself. In undertaking this review, however, the court must necessarily conduct some inquiry into plaintiff's arguments and defendant's responses concerning each of the five challenged test questions. Each of these questions will be addressed in turn.

The Contested Questions

1. *Question 38:*

Question 38 requires the examinee to apply the Customs procedures pertaining to importation of possible infringing copies as set forth in § 133.43(a) and (b) of the Code of Federal Regulations ("CFR"). Section 133.43 provides that if the district director of Customs ("director") has any reason to believe that an imported article may be an infringement of

---

[1] Plaintiff has withdrawn his complaint regarding exam question 18 and therefore, the court will consider his arguments on five of the exam questions, numbers 38, 44, 70, 90 and 92.

[2] In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), the Supreme Court stated that:

> Section 706(2)(A) requires a finding that the actual choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." * * * To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

a recorded copyrighted work, he shall withhold delivery of the articles. At that time the director shall notify the importer that, unless a denial is received within thirty days stating that the articles in question constitute infringing copies, the goods will be subject to seizure and forfeiture. If the importer files such a denial, then the director shall furnish the copyright owner with a sample of the imported article along with a notice that the articles will be released, unless within thirty days the copyright owner files a written demand for the exclusion from entry of the goods at issue as well as a bond conditioned to hold the importer harmless from any loss suffered should the Commissioner of Customs determine that the article is not an infringing copy.

Question 38 states:

> Your client, who is just starting to import toy stuffed dinosaurs, has a shipment under detention by Customs for possible copyright violation. Following your advice, he wrote to the District Director of Customs asserting that: (1) the articles are not piratical copies, and (2) because the dinosaurs are sold seasonally, continued detention will force him out of business; The District Director will:
>
> A. Release the shipment to the importer unconditionally because they are seasonal and the District Director has authority to determine if they violate the copyright.
>
> B. Furnish the copyright owner with a sample and release the shipment if he does not respond within 30 days.
>
> C. Release the shipment if the importer agrees to post an additional bond.
>
> D. Consider the goods to be restricted and seize the shipment.

Defendant states that plaintiff chose B which defendant characterized as an incorrect answer. In its Memorandum, defendant states that the official answer selected by Customs was D. Plaintiff, however, candidly admits that the official answer sheet lists B as the correct answer and that he marked D on his answer sheet.

Plaintiff contends that to choose B as the correct answer he would have had to assume three things: that whatever his client "wrote" to the director was actually received; that such letter was received within thirty days after the denial; and that such letter was an acceptable denial. Plaintiff argues that the Assistant Secretary erred in rejecting plaintiff's appeal because requiring the examinee to leap through these assumptions in arriving at the correct answer placed an unreasonable burden on any test-taker. Despite such "ambiguities," selection of answer D would require a much greater leap of faith. While not perfect, the question was adequate so that, as to this question, plaintiff's appeal was rejected reasonably.

2. *Question 44:*

Section 177.23 of the CFR provides that a country-of-origin advisory ruling or final determination may be requested by the following groups or individuals:

> (a) A foreign manufacturer, producer, or exporter, or a United States importer of merchandise,

(b) A manufacturer, producer, or wholesaler in the United States of a like product,

(c) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product, or

(d) A trade or business association a majority of whose members manufacture, produce, or wholesale a like product *in the United States*.

19 C.F.R. § 177.23 (1989) (emphasis added).

Question 44 asks the examinee to choose the individual or group which may *not* request a country-of-origin advisory ruling or final determination from the following four choices:

A. Any foreign manufacturer, producer, or exporter whether or not they are actually producing or selling the item or a like product.

B. A manufacturer in the U.S. who is contemplating producing an identical or like product.

C. A trade association in which a majority of their members wholesale an identical or like product.

D. Any U.S. importer of merchandise.

E. U.S. members of a labor organization whose members are employed in the U.S. and manufacture a like product.

Plaintiff chose C because he claims that it cannot be assumed from the question that the majority of members in this trade association wholesale their product in the United States and therefore, this group may not request a country-of-origin advisory ruling or final determination.

As the test specifies in the general instructions, the *best* answer must be chosen. The conclusion that B is a better choice than C is not erroneous. The regulations make clear that a manufacturer, producer, or wholesaler in the United States must be actively producing or selling the like product. The word "contemplating" is used in the question in an attempt to discern whether the examinee realizes the distinction between those producing the like product at the present time and those who might produce it in the future. To assume that mere contemplation is equivalent to active production or wholesaling, the test-taker must actually change the meaning of the written words.

Whatever appeal answer C might have, the actual language of B is at odds with the regulation. Thus, the decision of the Assistant Secretary to reject plaintiff's request for credit on this question was not arbitrary, capricious, or in any way contrary to law.

3. *Question 70:*

In question 70, the test-taker is asked to determine which statement among the four choices is a correct representation of the Customs regulations. The official answer sheet lists the single correct statement as B: "Merchandise in a foreign trade zone will be considered exported upon admission to a zone restricted status." The relevant portion of the regulations addressing exportation in a foreign trade zone provides: "Merchandise may be withdrawn for exportation at a foreign trade zone in the

same or at a different port. The merchandise will be considered exported upon admission to a zone in zone-restricted status * * *" 19 C.F.R. § 144.37(g) (1989). Obviously the statement from the test is taken verbatim from the regulations and as such is a correct statement. The absence of the introductory sentence from the statement on the test in no way renders the excerpted material any less correct.

Plaintiff contends that answer D is an equally, if not more, correct answer. Choice D states that "The splitting up for exportation of shipments arriving under warehouse withdrawals for indirect exportation is permitted only when various portions of a shipment are destined to different destinations." Answer D may be considered incorrect because it is an incomplete representation of the regulation. The complete sentence in the regulations provides "The splitting up for exportation of shipments arriving under warehouse withdrawals for indirect exportation shall be permitted only when various portions of a shipment are destined to different destinations, *when the export vessel cannot properly accommodate the entire quantity, or in other similar circumstances.*" 19 C.F.R. § 144.37(b)(2) (1989) (emphasis added). Answer D does not take into account the fact that there are two other circumstances where the regulations permit the splitting up for exportation of shipments arriving under warehouse withdrawals for indirect exportation. The statement on the test retains the word "only," thereby eliminating the possibility that one condition alone would be sufficient to render the statement correct.

As B is the best answer, the Assistant Secretary's decision on this question was justified.

4. *Question 90:*

Question 90 states:

> Your client has imported merchandise which had been released following FDA sampling. Subsequent to release, FDA determines that the merchandise is not fit for human consumption. Customs issues a CF4647 demanding redelivery of the merchandise. The entry summary has been filed and estimated duty tendered. You should tell your client to:
>
> A. Sell the merchandise and petition for mitigation of liquidated damages.
>
> B. Hold the merchandise at his (importer's) premises.
>
> C. Export the merchandise and file a claim for drawback of duty.
>
> D. Export the merchandise under Customs supervision.

Rather than examining the options available in the answers, plaintiff offers a long chain of reasoning to prove that all of the possible answers were incorrect. Plaintiff observes that if he were the customs broker in question, he would have significantly more advice for his client than the simple answers provide.

Plaintiff focuses on the conclusiveness of the determination that the merchandise "is unfit for human consumption." Rather than taking this determination as a fact given in the question, plaintiff maintains that he

would argue with the FDA testing of the product. Plaintiff cannot unilaterally rewrite the question.

Moreover, plaintiff chose B as the best answer, because even though keeping the merchandise at the importer's premises is not the same as keeping the goods in Customs custody, he would instruct the client to hold the merchandise at his premises for only a short period of time before turning it over to Customs custody. Thus, even plaintiff's extra-factual reasoning fails to provide a listed answer and plaintiff is forced to make assumptions grounded in some mystical notion of equivalency of various custodies.

The regulations state that "If merchandise released under a special permit for immediate delivery later is found to be prohibited * * * withdrawal or entry summary documentation and the deposit of estimated duties, if any shall not be required provided * * * the merchandise is *exported or destroyed* under Customs supervision * * *" 19 C.F.R. § 142.28(a)(1) (1989) (emphasis added). Given the existence of answer D, a clearly correct answer, the Assistant Secretary's decision to not permit plaintiff to rewrite the question was not arbitrary or capricious. Examinees cannot be permitted to reach conclusions by taking a portion of the question and formulating their own factual scenarios.

5. *Question 92:*

Question 92 addresses what is necessary and what is unnecessary for liquidation when the importer enters certain merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS") for use in his production of agricultural equipment. The question asks the examinee to choose which of the following is unnecessary for liquidation under the HTSUS:

> A. A written declaration of intent that the merchandise will be used for agricultural purposes.
> B. The merchandise is actually used for agricultural purposes.
> C. The importer furnishes proof of agricultural use to satisfy Customs.
> D. The proof of use is furnished within 3 years of entry or withdrawal from warehouse for consumption.

The portion of the Customs regulations relevant to this question states:

> When the tariff classification of any article is controlled by its actual use in the United States, three conditions must be met in order to qualify for free entry * * * The conditions are that:
> (a) Such use is intended at the time of importation.
> (b) The article is so used.
> (c) Proof of use is furnished within 3 years after the date the article is entered or withdrawn from warehouse for consumption.

19 C.F.R. § 10.133 (1989).

Obviously the test question requires the examinee to reflect upon what conditions are unnecessary for liquidation under this particular part of the regulations in order to determine whether the examinee is aware

that the regulations list three conditions that must be met. Plaintiff argues that answer C is correct and that the official answer, choice A, is incorrect. Choice A is unnecessary because nowhere in the regulation does it specify that the importer must supply a written declaration of intent regarding usage of the merchandise. Choice C is an incorrect answer because, as the regulation clearly indicates, proof of use is required. The test-taker could conceivably be confused since C and D are overlapping. It is often the case, however, that two exam answers will be almost identical or that one answer is merely a part of a longer, more general answer. While tests designed in such a way might cause the examinee to think twice about an answer, they are not unfair to the test-taker.

Accordingly, the decision of the Assistant Secretary to deny plaintiff credit for his incorrect answer to this question was a reasonable decision.

Conclusion

Parties should not conclude from the court's detailed examination of the test answers that: the court is some kind of final reviewer of the Customs broker licensing examinations. The administering agency must be allowed some latitude in designing and judging its tests. Plaintiff here did not pass, but that is not the standard of review. The Assistant Secretary's decision not to grant a license is upheld because it was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Accordingly, plaintiff's motion for judgment on the administrative record is denied, defendant's cross-motion is granted and this case is dismissed.

(Slip Op. 90–116)

U.H.F.C. Co., plaintiff *v.* United States, defendant

Court No. 83-11-01598

(Dated November 2, 1990)

Memorandum Opinion and Order

Musgrave, *Judge*: In accordance with the decision of the United States Court of Appeals for the Federal Circuit in *U.H.F.C. Company v. United States*, Appeal No. 89-1502 (Fed. Cir. Oct. 11, 1990), this Court's Order of February 14, 1989 is hereby vacated.

This action is remanded to the International Trade Administration for recalculation of the dumping margin consistent with the decision of the United States Court of Appeals for the Federal Circuit.

The International Trade Administration shall file results of the remand proceedings with the Court within 30 days of the date of this Order.

Upon consideration of plaintiff's motion for costs and due deliberation thereon, plaintiff's motion for costs is denied.

(Slip Op. 90–117)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN TOYO BEARING CO., LTD., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., DEFENDANT-INTERVENORS

Court No. 87-11-01082

Plaintiff contests certain adjustments and calculations made by the ITA in its final dumping determination.

Held: Pursuant to 19 U.S.C. § 1677a(e)(2), the ITA is instructed to deduct imputed financing charges from ESP calculations.

[Action remanded.]

(Dated November 5, 1990)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *John M. Breen*); of counsel: *Scott A. Scherff*, Senior Corporate Counsel, The Timken Company, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*); of counsel: *Stephanie J. Mitchell*, Attorney-Advisor, Office of Chief Counsel for Import Administration, Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman*); *Tanaka Ritger & Middleton* (*H. William Tanaka, Alice L. Mattice* and *John J. Kenkel*) for defendant-intervenor KOYO SEIKO COMPANY, LTD. and KOYO CORPORATION OF U.S.A.

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger* and *J. Kevin Horgan*) for defendant-intervenor NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, and NTN TOYO BEARING COMPANY, LTD.

OPINION

TSOUCALAS, *Judge*: Once again this Court is called upon to review the conclusions of the Commerce Department, International Trade Administration (ITA), in *Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings and Parts Thereof. Finished and Unfinished From Japan*, 52 Fed Reg. 30,700 (Aug 17, 1987), *amended*, 52 Fed. Reg. 47,955 (Dec. 17, 1987). On this occasion, the determination is challenged by the petitioners to the investigation, The Timken Company. Pursuant to Rule 56.1 of the rules of this Court, plaintiff moves for judgment on the agency record. Defendant as well as defendant-intervenors oppose plaintiff's motion.

BACKGROUND

Insofar as this action is predicated upon the same set of circumstances that existed in *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp.. and NTN Toyo Bearing Co. v. United States* ("NTN"), 14 CIT ____, Slip Op. 90-88 (Sept. 7, 1990), familiarity with which is presumed, and given that the Court granted a stay of the remand ordered

therein so that all related issues could be remanded together, this decision is to be considered in conjunction with the Court's opinion in that case.[1]

Plaintiff's allegations in the instant action are as follows: (1) the ITA's practice of proportionately allocating losses as well as profits to the "value added" to the tapered roller bearing ("TRB") components after importation unlawfully results in an undercollection of dumping duties; (2) 19 U.S.C. § 1677a(e)(2) (1982) required Commerce to deduct imputed financing expenses from the exporter's sales price ("ESP"); (3) the ITA failed to implement its stated methodology in selecting "most similar merchandise";[2] (4) the ITA's adjustment of TRB constructed values for differences in circumstances of sale is prohibited by 19 U.S.C. § 1677b(e); and (5) the ITA's failure to deduct resale profits from its ESP calculations was improper and contrary to law.

Discussion

The court's jurisdiction over this action is grounded upon 28 U.S.C. § 1581(b) (1982). Accordingly, the applicable standard of review is whether Commerce's determination is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. § 1516a (b)(1)(B) (1982). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gold Star Co. v. United States*, 12 CIT ____, ____, 692 F. Supp. 1382, 1383-84 (1988), *aff'd sub nom., Samsung Elec. Co. v. United States*, 873 F.2d 1427 (1989).

Moreover, the party challenging Commerce's determination bears the burden of proving the agency's error. *Brookside Veneers. Ltd. v. United States*, 847 F.2d 786, *cert. denied*, 109 S. Ct. 369 (1988). With this established, the Court turns to plaintiff's contentions.

I. *Loss allocation to "value added":*

When TRB parts are imported to be further processed into finished bearings by a party related to the foreign importer, Commerce calculates a U.S. price for the TRB based on exporter's sales price, pursuant to 19 U.S.C. § 1677a(c).[3] In order to accurately reflect the value of the imported component, 19 U.S.C. § 1677a(e)(3) provides for the adjustment of ESP by the amount, if any, of

> any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

Although not explicitly provided, Commerce has interpreted this provision to allow for the proportional allocation of any profits or losses at-

[1] Refer to this Court's decision in *NTN*, for a comprehensive history of the circumstances surrounding these actions.

[2] The Court, however, does not address this allegation as it was subsequently withdrawn upon Commerce's explanation that plaintiff misinterpreted the computer printouts which indeed bore out that the stated methodology *was* applied to determine "most similar merchandise." *See Plaintiff's Reply Brief* at 16; *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the Agency Record* ("Defendant's Memo") at 13-21.

[3] The aforementioned statute defines "exporter's sales prices as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter."

tributable to the value added after importation. *See Final Determination of Sales at Less Than Fair Value; Color Picture Tubes From Japan*, 52 Fed. Reg. 44,171 (Nov. 18, 1987); *Final Determination of Sales at Less Than Fair value: Brass Sheet and Strip From Sweden*, 52 Fed. Reg. 819 (Jan. 9, 1987); *Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447 (Oct. 31, 1985).

Commerce's proportional allocation of profits attributable to the "value added" was most recently examined by the court in *Sandvik AB v. United States*, 13 CIT ___, 721 F. Supp. 1322 (1989), *aff'd*, 904 F.2d 46 (1990). There the court determined Commerce's interpretation of the statutory mandate to be reasonable and in accordance with established agency practice. *Id.* at 1336.

Moreover, in *Sonco Steel Tube Div., Ferrum. Inc. v. United States*, 12 CIT ___, 694 F. Supp. 959 (1988), the court noted that since "the plain words of the statute and regulation neither expressly prohibit nor require ITA to consider profit as an element of value added," the decision to include a portion of profits in the value added was well within the ITA's discretion. *Id.* at 966.

Plaintiff, while seemingly in agreement with this prong of the ITA's practice, rejects what appears to this Court to be a natural corollary. Apparently, plaintiff would have the ITA proportionately deduct profits associated with the "value added" after importation (the effect of which would be to reduce ESP), while not attributing any portion of losses to the "value added" calculation (the effect of which would be to artificially depress ESP). Timken supports this argument by reasoning that the statute does not specifically provide for the proportional allocation of losses. The Court, however, is not persuaded by this partisan analysis since the statute neither provides for the allocation of profits.

The reasoning put forth by plaintiff produces such a patently unfair result that this Court cannot envision it to have been intended by Congress. In contrast, the Court finds that Commerce's practice of allocating losses to the "value added" is consistent with the statutory intent that dumping duties be imposed on the value of the imported merchandise only.

When, as in this case, the enabling statute is silent with respect to the matter at issue, a reviewing court must give reference to the agency's interpretation if it is a reasonable construction of the statute. *K Mart Corp. v. Cartier*, 486 U. 5. 281 (1988). This is especially true where that interpretation represents established agency practice. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, (1978). Accordingly, this portion of Commerce's determination is affirmed.

II. *Imputed financing expenses:*

As is often the case where related parties are involved, respondents NTN and KOYO transferred their products to their U.S. subsidiaries under artificially favorable credit terms. Because Commerce recognizes that this preferential treatment can potentially reduce the subsidiaries'

financing expenses substantially, an imputed financing expense[4] is generally deducted from the ESP calculation pursuant to 19 U.S.C. § 1677a(e)(2), to achieve a more pragmatic calculation. This practice has been sanctioned by this court most recently in *Silver Reed America. Inc. v. United States*, 12 CIT ____, 679 F. Supp. 12 (1988).

Plaintiff maintains that such an adjustment to ESP was not made in the instant action and therefore seeks to have this mistake corrected. Commerce acknowledges that imputed financing expenses should have been deducted from ESP and alludes to inadvertent error for its failure to do so.

Defendant-intervenor KOYO, while in agreement that an imputed financing expense adjustment is required, maintains that the imputed amount should also be factored into the ESP offset. In addition, defendant-intervenor NTN alleges that its accounting practices already provide for these expenses to be reflected elsewhere as an indirect selling expense.

In light of the parties' consensus on this issue, the matter is remanded to the ITA, which shall correct the inadvertent omission of imputed financing charges from ESP calculations. Any adjustments to fair market value, flowing from an increase in the ESP offset, are to be made if warranted. Furthermore, as it is undisputed that the double counting of adjustments to ESP is impermissible, *Silver Reed America. Inc. v. United States*, 12 CIT ____, ____, 683 F. Supp. 1393, 1395 (1988), the ITA shall assure that actual financing expenses incurred by respondents on behalf of their U.S. subsidiaries are not otherwise reflected on their records.

III. *Adjustments to constructed value:*

During the course of its investigation in this case, the ITA was unable to determine a home market price or third country price for several TRB models involved. It therefore based fair market constructed value pursuant to 19 U.S.C. § 1677b(e)(1982) (Supp. V 1987).[5] Furthermore, Commerce

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[4]The financing expense must be imputed since the importers' accounting practices don't generally reflect the cost borne on behalf of their subsidiaries.

[5]19 U.S.C. § 1677b provides in pertinent part:

(1) In general

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person –

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or

(B) if not sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

. . . . . .

(2) Use of constructed value

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

> made circumstances of sale adjustments to constructed value for differences in credit expenses. In addition, where the U.S. sales prices were calculated based on ESP, [they] made an offset for indirect selling expenses on the U.S. sales against home market indirect selling expenses, in accordance with § 353.15(c) of Commerce's regulations.

52 Fed. Reg. at 30,701.

Plaintiff now challenges these adjustments claiming that their effect is to "nullify the provision of the statute which requires the inclusion of general expenses in constructed value." *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Judgment on the Agency Record* ("Plaintiff's Memo") at 34.

This court has on more than one occasion scrutinized the ITA's practice of adjusting constructed value for differences in circumstances of sale. *The Timken Co. v. United States*, 11 CIT 786, 673 F. Supp. 495 (1987);[6] *The Asociacion Colombiana de Exportadores de Flores v. United States* ("*Exportadores*"), 13 CIT ____, 704 F. Supp. 1114 (1989). In each instance, this practice has been deemed reasonable and in accordance with the statutory mandate.

Nevertheless, plaintiff maintains this case law is "not *res judicata* in this action, which involves different merchandise and a different record." *Plaintiff's Memo* at 34. The Court, however, is frankly baffled by this distinction as the challenged agency practice is identical in each of these cases. As stated in *Exportadores*, plaintiff herein has not "presented [any] convincing reason why *Timken* should not be followed." *Exportadores* at 1120. Commerce's adjustments to constructed value are therefore sustained.

IV. *Deduction of resale profits from ESP:*

Plaintiff's final challenge is directed at the ITA decision not to deduct resale profits from ESP. Timken maintains that Commerce was required, under The Trade Agreements Act of 1979, to deduct resale profits from ESP. Here again plaintiff asserts a claim previously rejected by the court. *See The Timken Co. v. United States* ("*Timken I*"), 10 CIT 86, 630 F. Supp. 1327 (1986). The Court, once more, finds plaintiff's arguments unpersuasive.

Section 1677a(e)(1) of title 19 (1982) compels the ITA to deduct from ESP any "commissions for selling in the United States the particular merchandise under consideration." Commerce has traditionally interpreted this provision to require a deduction of commissions only. Timken, on the other hand, claims that because the International Dumping Code ("Code")[7] recommends that "commissions" should be understood

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[6] The court's opinion in *Timken* provides an excellent extended analysis of the ita view on the issue of circumstances of sale adjustments to constructed value.

[7] The International Antidumping Code is a multilateral agreement endorsed by the United States in 1979 in the course of the Tokyo Round of Multilateral Trade Negotiations. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *reprinted in* H.R. Doc. No. 153, Part 1, 96th Cong., 1st Sess. 312 (1979).

to encompass "commissions and profits," the ITA is required to adopt the broader interpretation which comports with international law.

Inasmuch as this matter was thoroughly examined and conclusively decided in *Timken I*, plaintiff does not present a sustainable argument herein. Suffice it to state, however, whatever guidance the ITA gleans from the Code is clearly hortatory rather than mandatory. This Court finds then, as did the court in *Timken I*, that Commerce's interpretation of "the word 'commissions' to mean only commissions, and not 'commissions and profit,' is reasonable" and in accordance with law. Id. at 111, 630 F. Supp. at 1348.

CONCLUSION

In accordance with the decision, the Court remands this action to the ITA. The ITA shall include imputed financing expenses into ESP and recalculate its computations as necessary. Adjusted results are due within forty-five days of issuance of this decision.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/506 10/29/90 Re, C.J.	Bill T. Closs	82–11–01553	700.95 12.5%	700.35 or 700.45 8.5% or 10%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87-136 (1987)	San Francisco Footwear
C90/507 10/30/90 Tsoucalas, J.	Berkshire Fashions, Inc.	86–3–00404	706.41 or 706.61 20%	A386.13 Free of duty or 20% or 17.5%	Agreed statement of facts	New York Shopping bags
C90/508 10/30/90 Tsoucalas, J.	Sarne Handbag Co.	87–2–00176	706.41 20%	706.34 11.6%	Agreed statement of facts	New York Handbags
C90/509 10/31/90 Aquilino, J.	Casio, Inc.	88–2–00109	716.09–716.45, 715.05, or 705.15 Various rates	688.45, 688.42, 688.43, 688.36, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles, New York Quartz analog watches
C90/510 11/1/90 DiCarlo, J.	Rhone Poulenc, Inc.	86–1–00040	423.00 Various rates	523.11 Free of duty	Rhone Poulenc, Inc. *v.* U.S., S.O. 87–75	Boston Silica
C90/511 11/2/90 Tsoucalas, J.	Bershire Handkerchief	85–9–01326	706.41 or 706.61 20%	A386.13 Free of duty or 20% or 17.5%	Agreed statement of facts	New York Shopping bags
C90/512 11/2/90 Re, C.J.	Endicott Johnson Corp.	82–11–01627	700.95 12.5%	700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87–136 (1987)	Baltimore Footwear
C90/513 11/2/90 Re, C.J.	Endicott Johnson Corp.	84–6–00798	700.95 12.5%	700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87–136 (1987)	New Orleans Footwear

C90/514 11/2/90 Aquilino, J.	Fada Industries, Inc.	84–11–01610	716.09–716.45, 715.05, or 715.05 Various rates	688.45 or 688.43 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989)	New York Quartz analog watches

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